

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Request for Review by)	
Darien Telephone Company,)	CC Docket No. 96-45
Inc. et al. of Decision of)	CC Docket No. 00-256
Universal Service Administrator)	

COMMENTS OF JOHN STAURULAKIS, INC.

JSI welcomes the opportunity to comment on significant matters in the above captioned proceeding.¹ JSI strongly urges the Commission review the decision of the Universal Service Administrative Company (“USAC”) which immediately negatively impacts the three petitioning companies and casts a pall over the entire administration of federal high cost universal service support. By taking swift action reversing this USAC decision, the Commission will set aright the administration of a critical component of federal high-cost universal service support.

1. BACKGROUND

Federal high-cost universal service support is designed specifically to provide eligible carriers with predictable support to help foster investment in network infrastructure and operations to better serve the communities they serve. A hallmark of federal high-cost support, since its inception, has been the predictability of these support funds and the proper administration of the support programs consistent with the objectives established by this Commission.

Recently, the predictability of support and the credibility of the administration of the program have been upended by a decision interpreting a rule involving Safety Net Additive support.² On March 2, 2005 USAC announced that it was changing the method of calculating Safety Net Additive support on both a prospective and retroactive basis.

¹ *Darien Telephone Company, Inc., Logan Telephone Cooperative, Inc., and Roanoke & Botetourt Telephone Company Request Review of the Universal Service Administrative Company’s Decisions Regarding Safety Net Additive Support*, CC Docket No. 96-45, Public Notice, DA 05-1953, rel. July 6, 2005.

² Safety Net Additive Support is additional universal service support provided to rural carriers that have made significant investment in rural infrastructure during the period in which the support level would otherwise exceed the indexed cap on the high-cost support loop fund. *See Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244 (2001) (“MAG Order”) at 78, 80.

USAC justifies its retroactive collection of support already given to carriers with a letter from the Wireline Competition Bureau chief dated January 14, 2005. In this letter, the Bureau responds to a memorandum written by USAC in 2003 requesting assistance from the Bureau regarding an interpretation of rule 47 CFR § 36.605 (the “Safety Net Additive Rule”).

At the time of it seeking guidance in 2003, USAC provided no notification to carriers that its calculation of Safety Net Additive support was subject to an interpretation of the Bureau and that based on this interpretation refund of Safety Net Additive support may be required. When USAC finally received guidance from the FCC in January 2005, USAC declared that the FCC’s clarification of the Safety Net Additive Rule “required” the agency to recalculate the support for companies that filed subsequent qualification letters. According to USAC, this meant that in addition to adjusting support on a prospective basis, the rural carriers were required to refund monies advanced to them to date. In the case of the three carriers, these refunds are substantial (Logan \$133,000; R&B \$255,000; and Darien \$125,000).

2. REVIEW OF USAC ACTION IS NECESSARY BECAUSE USAC VIOLATED THE CARRIERS’ DUE PROCESS RIGHTS

The retroactive repayment of Safety Net Additive support is significant for these and other rural carriers that have been adversely affected by USAC’s decision. These carriers filed initial Safety Net Additive qualification letters. In subsequent years these carriers filed additional Safety Net Additive qualification letters. USAC accepted all qualification letters and provided financial support based on these qualification letters.

Unbeknownst to the carriers receiving Safety Net Additive support based on subsequent year qualification letters, USAC sought guidance from the Bureau on its then current practice of accepting subsequent qualification letters. None of the carriers filing subsequent qualification letters were notified of USAC’s request – the memorandum from USAC to the Bureau apparently is not available for inspection by the affected carriers, nor by the industry.

The Commission has found that “[d]ue process requires that parties receive fair notice before being deprived of property,” and has held that “[i]n the absence of notice-for example, where the regulation is not sufficiently clear to warn a party about what is expected of it-an agency may not deprive a party of property by imposing civil or criminal liability.” See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, FIFTH MEMORANDUM OPINION AND ORDER, 16 FCC Rcd 416, 66 FR 8899 (2000) citing General Elec. Co. v. EPA, 53 F3d at 1328-29 (DC Cir 1995). Specifically, the Commission stated,

In GE, EPA had fined General Electric for distilling used solvents and incinerating only the contaminated portion instead of immediately

incinerating the entire solution. 53 F3d at 1326-27. Although we deferred to EPA's interpretation of its regulations as requiring immediate incineration of the entire solution, we held that the agency could not fine GE for its failure to comply with an interpretation that was "so far from a reasonable person's understanding of the regulations that [the regulations] could not have fairly informed GE of the agency's perspective." *Id.* at 1330. See also, e.g., *United States v. Chrysler Corp.*, 158 F3d 1350, 1354-57 (DC Cir 1998) (holding that agency failed to provide fair notice of specific requirements of compliance testing and government therefore could not seek an automobile recall on the ground that Chrysler had failed properly to perform the testing); *Rollins Env'tl. Svcs. (NJ) Inc. v. EPA*, 937 F2d 649, 653 (DC Cir 1991) (rescinding fine assessed by EPA because regulation was ambiguous); *Gates & Fox Co., Inc. v. OSHRC*, 790 F2d 154, 156 (DC Cir 1986) (holding that agency failed to give fair notice of its interpretation that breathing equipment was required where the regulation "would reasonably be read" not to require the equipment).

In this case, it is clear that the carriers would not have been placed on notice by reading the regulation at issue. In subpart (c)(1) of the rule, it states "*In any year* in which the total carrier loop cost expense adjustment is limited by the provisions of §36.603 a rural incumbent local exchange carrier shall receive safety net additive support ..." (Emphasis Supplied). Subpart (c)(2) of the rule requires the carrier to provide a notification of eligibility if the conditions in (c)(1) are met. Even under USAC's own interpretation, the carriers were acting according to the rule when submitting subsequent qualification letters. In fact, under (c)(2) it could be understood that failure to file subsequent qualification letters for "any year" that qualifies would result in disqualification of Safety Net Additive support.

Upon receipt of these subsequent qualification letters, USAC calculated Safety Net Additive support for these carriers and authorized the disbursement of support. The requests for review from the carriers clearly show that USAC did not notify these carriers that subsequent qualification letters may result in a recalculated Safety Net Additive support amount. In advance of the March 2005 repayment demands, the carriers were never notified that repayment of certain Safety Net Additive support amounts may be required. We believe that USAC's new interpretation of the Bureau's letter is a violation of the carrier's due process and JSI supports the carriers' request for review of this entire matter at the Commission level.

3. REVISION OF USAC INTERPRETATION IS REQUIRED TO REBUILD CONFIDENCE IN UNIVERSAL SERVICE ADMINISTRATION

The retroactive repayment of universal service support in this matter is poor public policy and casts an unwelcome shadow over the administration of federal high-cost universal service support.

The carriers argue and the courts agree that retroactive repayment of support must be based on a rational purpose. In this matter, there is no clear rational purpose for retroactive repayment of support. The carriers were following the rule that requires subsequent notification of qualification for “any year” in the Rural Task Force regime. USAC accepted these qualification letters unconditionally and made support disbursements based on these qualification letters. In 2003, USAC knew it was disbursing support according to its interpretation of the rule. There is no rational purpose requiring repayment of support that has already been disbursed to the carriers under these conditions. We note that this support isn’t sitting idle -- the carriers have represented that this support has been used to improve its universal service offerings to the communities they serve. Hence, requiring retroactive repayment serves no rational purpose within the goals of universal service.

This Commission can and should do all to avoid sending the signal that rules can change without due process and retroactive repayment of support is possible without a rational purpose. By reversing USAC’s decision requiring retroactive repayment, the Commission will instill confidence in the high-cost program and reestablish the predictability of support required by the Telecommunications Act.

4. CONCLUSION

JSI urges the Commission to review USAC’s decision regarding Safety Net Additive support and determine that retroactive payment of safety net funds disbursed and currently used in the provision of telecommunications service in the affected carriers’ communities does not serve a rational purpose and should not be required. Accordingly, JSI urges the Commission to reverse the decision made by USAC and restore the Safety Net Additive support inappropriately taken from the affected carriers. By taking this action the Commission will set aright the purposes and goals of Safety Net Additive support and send a proper signal that the interpretation of rules and changes to these interpretations shall not be done without due process and openness characteristic of the actions of this Commission.

Respectfully submitted,

August 4, 2005

John Staurulakis, Inc.

/s/ Manny Staurulakis

Manny Staurulakis
President
John Staurulakis, Inc.
7852 Walker Drive, Suite 200
Greenbelt, Maryland 20770